Supreme Court, U.S.
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No. 97-797

In the
Supreme Court of the United States
October Term, 1997

YANKEE ENTERPRISES, INC.,
Petitioner,

vs.

DUNKIN' DONUTS INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

On January 2, 1990, Dunkin' Donuts Incorporated became an indirect wholly owned subsidiary of Allied Domecq PLC. Allied Domecq is a publicly traded United Kingdom company primarily engaged in the drinks and food business. Allied Domecq's principal place of business is 24 Portland Place, London, England. Dunkin' Donuts is part of and reports to an unincorporated division called Allied Domecq Retailing USA. Allied Domecq Retailing USA's principal place of business is 14 Pacella Park Drive, Randolph, Massachusetts 02368.

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STATEMENT OF THE CASE

This action was filed by Yankee Enterprises, Inc., a Dunkin' Donuts franchisee, in the United States District Court for the Eastern District of Texas on March 13, 1995. On April 1, 1996, Yankee filed its Second Amended Complaint. Its claims were for breach of contract, violations of the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. §§ 17.41 - 17.63 (1987) (the "DTPA"), and fraud. On April 11, 1996, the District Court, the Honorable Joe J. Fisher, granted Dunkin's motion for summary judgment on Yankee's fraud claim. Record 1499.

A jury trial was held on April 29-May 8, 1996. The jury's verdict was in favor of Yankee, finding that Dunkin' had "failed to comply with the Franchise Agreement" and had committed violations of the DTPA. Dunkin's post-trial motion for judgment as a matter of law was granted in part and denied in part. The district court granted Dunkin' judgment on Yankee's DTPA claims but let stand the breach of contract verdict. Dunkin's motion for a new trial was denied, as was Yankee's motion for an award of attorneys' fees and costs. Record 2536.

The United States Court of Appeals for the Fifth Circuit affirmed the district court's order setting aside the jury verdict on Yankee's DTPA claims.[1] The Fifth Circuit also found "no credible evidence" to support the jury's finding that Dunkin's alleged breach of contract caused Yankee to suffer damages, and therefore reversed the judgment entered on the breach of contract claim and rendered a take nothing judgment in favor of Dunkin' Donuts.

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[1] Yankee is not petitioning from the Fifth Circuit's affirmance of the denial of its DTPA claims. Yankee never mentions the DTPA in its Questions Presented; it is not cited to in its Table of Citations; and it is not discussed in the Argument section of its petition.

REASONS FOR DENYING THE WRIT

I. THE BASIS FOR THE FIFTH CIRCUIT'S FINDING THAT YANKEE PRESENTED "NO CREDIBLE EVIDENCE" OF CAUSATION OF DAMAGES IS NOT ADDRESSED IN YANKEE'S PETITION, IS NOT ERRONEOUS, AND DOES NOT PRESENT AN ISSUE THAT IS IN NEED OF REVIEW BY THIS COURT.

The franchise agreement provision at issue was Dunkin' Donuts' promise to "continue its efforts to maintain high and uniform standards of quality, cleanliness, appearance and service at all Dunkin' Donuts shops." Pl. Ex. 2 at ¶ 3.C. Yankee claimed that Dunkin' had breached the agreement by taking certain actions that led to less shop cleanliness in the west, although not in Beaumont, Texas (where Yankee's shop is located and shop cleanliness remained high (tr. at 220, 268)), and lost profits for Yankee. Yankee presented a number of franchisees to testify that they had observed unclean shops at various locations throughout the west, but all of them admitted they had "no idea," "wouldn't have a clue," or "couldn't tell you" whether what they observed could have damaged Yankee. Tr. at 542, 585, 608. This included Yankee's president, Greg Nelson, who testified when asked to explain his own sales decline (which did not even occur until two years after the alleged breach): "I'm at a complete loss to understand it." Tr. at 298-99.

While Yankee's petition discusses a variety of reasons why it believes it proved that a breach occurred, that issue is not even before this Court because the Fifth Circuit never reached the question of breach, as it stated: "Dunkin' also argues that there is insufficient evidence to support the jury's conclusion that it breached the franchise agreement. Because we conclude

that [the] jury verdict must be reversed on other grounds, we do not address this issue." Pet. at 5a n.2.

Instead, the Fifth Circuit's opinion was based on its decision that "Yankee has produced no credible evidence that the damages claimed are causally related to Dunkin's alleged breach of contract," and that Yankee's theory that the alleged breach caused it to suffer damages "is nothing more than conjecture and surmise." Pet. at 7a. There are a number of reasons for this ruling, but first and foremost is the fact that Yankee's damages "expert"[2] testified that a breach that allegedly occurred in 1989 or 1990 caused damages that began to accrue *six years earlier*, in 1984 -- *a fact that is not mentioned at all in Yankee's petition.* The Fifth Circuit devotes an entire section of its opinion to a detailed discussion of the basis for its ruling. We reproduce it because it is dispositive of (yet ignored by) Yankee's petition:

> Yankee argued at trial that Dunkin' had breached its promise in the franchise agreement to "continue efforts to maintain high and uniform standards of quality, cleanliness, appearance and service at all Dunkin' Donut shops." More particularly, Yankee argued that Dunkin' diverted its attention and resources to the Northeast and failed to continue efforts in the West zone, where Yankee was located, and this failure caused Yankee to lose sales.
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> *Yankee began with a suspect causation theory*: The reduced standards of cleanliness in the other stores in the West zone damaged Yankee's sales even though

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[2] Yankee's expert was John Croley, a Beaumont accountant and lawyer who proffered no training or experience in lost profits analysis, but had "hands-on" experience doing accounting and sales for a meat company and a restaurant. Tr. at 383-87. He had never been qualified as an expert in any area (tr. at 387), and was admitted as an expert over objection (tr. at 414).

Yankee's store met or exceeded the high standards in place prior to the alleged breach.[3] In support of this contention, Yankee produced the testimony of John Croley, its expert witness on damages. Although Yankee contended that Dunkin's breach began in 1989 or 1990, Croley compared Yankee's average weekly sales for the years 1984 through 1996 to the sales of the average store in the Northeast zone. Croley testified that Yankee's store was comparable to that of the average store in the Northeast zone because in 1984 Yankee's average weekly sales were only $229 less than the average weekly sales of the Dunkin' franchises located in the Northeast zone. Croley testified that the difference in sales between the "comparable" Northeastern stores and Yankee's store increased from 1984 through 1996. He attributed this increased difference to Dunkin's failure to continue its efforts to maintain high standards in the West zone.

But Yankee's expert did not fare well in cross examination. *First, the "gap" between the comparable Northeast store and Yankee's store existed at least four years before Dunkin's breach, which allegedly occurred in 1989 or 1990. It is obvious, and Croley admitted, that the diminution in sales that occurred from 1984 through 1988 cannot be attributed to an event that took place in 1989.* The expert also admitted he did not consider a number of factors (other than the difference in standards between Northeast stores and West stores) that could account for the "gap." These factors include, but are not limited to, a difference in management skill between the hypothetical Northeast store and Yankee's store; a difference in market penetration; and a difference in volume of advertising.

> *In sum, Croley's theory, that Dunkin's breach caused the "gap," is nothing more than conjecture and surmise*. Because we conclude that *Yankee has produced no credible evidence that the damages claimed are causally related to Dunkin's alleged breach of contract*, the judgment predicated on breach of the franchise agreement cannot stand.
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> 3. Another Dunkin' franchisee testified that a customer who had a bad experience in another Dunkin' shop in the West zone may not stop at a Dunkin' shop while driving through Beaumont. *Other than this vague testimony we find no support for Yankee's theory that reduced standards in other shops in the West caused a substantial sales reduction in Yankee's shop*. No proof was presented to explain or substantiate the details of this theory.

Pet. at 5a-7a (emphases added) (footnote included).

Thus, the Fifth Circuit rejected -- as it had to -- Yankee's theory that a breach in 1990 caused damages that began to accrue in 1984, as well as Yankee's unsupportable comparison between its sales and those of the average shop in the northeastern part of the country. Yankee does not even attempt to explain why this ruling was wrong, nor could it.[3] Its own

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[3] Hidden in a footnote, Yankee makes a passing attempt at justifying the "gap" by stating that Dunkin's alleged failure to maintain standards in the west predates the time period for which recovery was sought. Pet. at 13 n.2. Aside from the fact that Yankee's claim was that the breach occurred in 1990, the problem with this argument is that Nelson testified that Dunkin' had fulfilled its contractual obligations up until 1990. Tr. at 239-43.

expert conceded, as the Fifth Circuit found, that there are numerous factors that can affect sales that he did not analyze when calculating what Yankee's sales allegedly should have been (tr. at 424-25), and admitted that a breach in 1990 could not cause damages beginning in 1984 (tr. at 443-44).[4] And finally, while Yankee's claim hinged on a showing that Dunkin's alleged breach caused damage to the entire Western region of the country and, consequently, to Yankee as well -- a "suspect causation theory" as the Fifth Circuit called it -- the undisputed evidence, contained in exhibits introduced by *both* Dunkin' and Yankee, showed that sales in the west *rose* steadily during the years in question. Pl. Ex. 142, Def. Ex. 182.[5] Thus, Yankee misrepresents its own evidence to this Court when it claims that "store sales, profits, . . . were all lower in the WZ" (pet. at 4-5), that there was "a rapid decline of sales and operations in WZ stores" (pet. at 8), and that Dunkin' caused a "WZ sales slide" (pet. at 16). This misrepresentation is repeated no fewer than eleven times in Yankee's petition.[6]

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[4] Yankee's only response in its petition to Croley's dispositive admission on comparability was to state that all Dunkin' shops should appear identical, and thus comparing Yankee's sales to the average Northeast zone sales is appropriate. Pet. at 13. Of course, if this is right, then *every* Dunkin' shop in the country -- and every McDonald's, for example -- should have identical sales and profits as the other shops in the chain, yet another proposition that defies common sense.

[5] Even the other Dunkin' Donuts franchisee in Beaumont experienced steadily rising sales, apparently avoiding the effect on the west that Yankee said had occurred. Tr. at 366-71, Def. Exs. 189, 191.

[6] Pet. at 2, 3, 5, 6, 8, 12, 13, 16.

Yankee does not dispute that the Fifth Circuit was correct when it reviewed the record and found that Yankee had made the impossible claim that a 1990 breach caused damages that started in 1984. But even if it had presented a plausible argument that the Fifth Circuit drew an erroneous factual conclusion from the evidence, that is not the kind of issue that warrants granting a petition for a writ of certiorari. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10.

II. THE LAW OF LOST PROFITS IS WELL SETTLED AND DOES NOT NEED TO BE ADDRESSED BY THIS COURT, AND YANKEE MISREPRESENTS THE LAW THAT IS APPLICABLE TO THIS CASE.

Yankee discusses several cases on the law of lost profits. The Fifth Circuit's numerous opinions in this area of the law require no review by this Court. Not only is the law discussed by Yankee well settled, but it has absolutely nothing to do with this case.

First, Yankee quotes a case for a seemingly low standard of proof necessary to establish causation of lost profits. Pet. at 14 (citing *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir. 1974)). That standard is confined to antitrust law and is "significantly less arduous than is usually the case in other actions." *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 999 n.113 (5th Cir. 1976) (distinguishing *Terrell* standard from breach of contract actions). *See also Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1066-67 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) ("Under this relaxed burden, a jury verdict may stand on

less evidence than is normally required to support a damage award in civil cases.") (citation omitted). Because this is not an antitrust case, this law is inapplicable.[7]

Second, Yankee attempts to justify its expert's use of the average sales figures of Dunkin' franchises in the northeast by invoking the "yardstick" approach. Pet. at 14. Under that approach, however, Yankee had the burden of proving that the other businesses were "closely comparable to plaintiff's." *Park*, 764 F.2d at 1068; *Caller-Times Publishing Co. v. Triad Communications, Inc.*, 791 S.W.2d 163, 172 (Tex. Ct. App. 1990); *Barbier v. Barry*, 345 S.W.2d 557, 563 (Tex. Civ. App. 1961) (rejecting comparison to third party's profits because of "material difference" between the parties' businesses). A lost profits claim will be rejected if it is based on incomparable statistics from an industry average. *See Cell, Inc. v. Ranson Investors*, 427 S.E.2d 447, 450 (W. Va. 1992). As the Fifth Circuit held, Yankee's expert never established comparability.

Yankee argued this theory to the Fifth Circuit, which correctly disregarded it. While we submit there is *no* theory of lost profits under which a plaintiff could recover damages that begin to accrue six years before the alleged breach, even if Yankee was correct and the Fifth Circuit misapplied the law to the facts, that again would not be cause for this Court to grant the petition. S. Ct. Rule 10.

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[7] Even under the "relaxed burden of proof" for antitrust plaintiffs, an award of lost profits will be struck as speculative if based on unsubstantiated assumptions by the expert witness, such as those made in this case. *Park*, 764 F.2d at 1066-67.

III. YANKEE'S PETITION CONTAINS ISSUES THAT WERE NOT RAISED BELOW, AS WELL AS NUMEROUS MISSTATEMENTS THAT MUST BE IDENTIFIED PURSUANT TO RULE 15.2.

In addition to those previously mentioned, Yankee offers several arguments to this Court that were never raised below. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). *See also Hormel v. Helvering*, 312 U.S. 552, 556 (1941). These arguments should be rejected for this reason, and for others. Moreover, Supreme Court Rule 15.2 requires Dunkin' to identify any misstatements of fact or law made in the petition. The misstatements of law have been discussed in Section II, above. Identifying all of the misstatements of fact is an impossible task; we will address the major ones.

1. Yankee's first argument is entitled "The Fifth Circuit Failed to Recognize That a Franchise Name, Reputation and Goodwill Have Inherent Value in Which Franchisees Have An Interest."[8] One reason the Fifth Circuit never addressed this question is because it was never presented to it (or, for that matter, to the district court). Although the point of this section of Yankee's petition is not entirely clear, it appears to be that franchisees who are affected by a breach of the standards clause are now left without a remedy due to the Fifth Circuit's opinion. As the Fifth Circuit made clear, however, *assuming* a breach by Dunkin', Yankee failed to demonstrate causation or damages. And although Yankee speaks of its concern that franchisees generally will be left without a remedy by the court's opinion, as we have shown, there was no evidence that western

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[8] This argument appears to be based on Yankee's first Question Presented: "Whether a franchisor owes a duty to franchisees to safeguard and protect the reputation and goodwill of the franchise . . . ."

franchisees suffered damages. Thus, Yankee's point is inapplicable here because it failed to show that it or *anyone* was affected by a breach.

2. The most egregious misrepresentation is Yankee's repeated and reckless allegation that Dunkin' diverted advertising funds from the West zone to the Northeast zone. Pet. at 3, 6, 7, 8, 16. There was no such claim in the case; it was never presented to the jury or included in Yankee's notice of appeal to the Fifth Circuit; and no evidence was submitted in support of it. Indeed, the evidence was directly to the contrary. The Dunkin' Donuts National Advertising Fund ("NAF") is independently audited each year by Peat Marwick, and the results of the audit are published to all franchisees. Tr. at 690, Def. Exs. 117, 118. The actual figures put before the jury showed that when the NAF monies are distributed to the markets for spending each year, Yankee's market receives back *more money than it contributes* to the fund. Tr. at 804-05, Def. Ex. 124.[9] If there were truly evidence that a wrongful diversion of advertising funds had occurred, one might have expected to see a claim to that effect, but there was none.

3. In its Statement of the Case, Yankee asserts that the "Fifth Circuit's opinion gives free license to franchisors to disregard their franchise agreements, provided that the breach extends to an entire region of franchisees." Pet. at 2. First, the Fifth Circuit expressly stated that it did not reach the question of breach; thus, its opinion cannot possibly have the effect Yankee claims. Second, there was no evidence that the alleged

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[9] The NAF receives twenty percent of all franchisee advertising fees. That money is used for the production of commercials, Sunday newspaper inserts, and other advertising production costs. Unused monies are then redistributed back to all markets. Tr. at 803-04.

breach extended to "an entire region of franchisees" (meaning the West region), since the evidence showed that average sales in that region increased.

4. Yankee repeatedly refers to its allegations that Dunkin' committed a wrong by focusing its development efforts in markets other than its own and by "exiting" from certain markets -- also other than its own. Pet. at 5, 7, 8. Dunkin's development strategy was the subject of Yankee's fraud claim, which was dismissed from the case on summary judgment and not appealed. Moreover, Yankee neglects to mention the following jury instruction given by the district court: "Dunkin' Donuts' decision regarding development in different markets is not a cause of action in the case or a basis for awarding damages. Nor is any decision to exit a given market a cause of action in the case." Tr. at 1112. Yankee made no objection to this instruction, thus waiving any claim it might have thought it had regarding development strategies or "exit markets."

5. While Yankee's assertion that there was a 91 percent reduction in West zone personnel has absolutely nothing to do with this case, we note that it is completely unsupportable. Dunkin' made company-wide reductions in personnel, but they were modest in number and announced to all franchisees. Tr. at 712-13, Pl. Exs. 15, 16.

6. Yankee claims that the West zone received "barely passing scores in sanitation, quality control, appearance and service (*i.e.*, 'standards')." Pet. at 2. To the contrary, franchisee witnesses testified that standards in the west are comparable to other regions. Tr. at 890, 970-71. This testimony was bolstered by statistical evidence from shop inspections showing no appreciable differences between regions in the Dunkin' system, and the testimony of Dunkin's Western zone general manager (tr. at 845-55), based on actual inspections of shops in different regions (*id.*, Def. Ex. 201).

7. Yankee argues that the franchise agreement is one-sided and lacking in mutuality. Pet. at 6. Not only has this issue never been raised before, it is also inaccurate. In addition to the standards clause at issue in this case, Dunkin' fulfills numerous obligations under the franchise agreement, which are footnoted below.[10]

8. Yankee contends that "prevailing low standards were shown within Yankee's immediate market . . . ." Pet. at 12. In fact, Nelson testified that his standards were "excellent" and those of the other shops in his immediate market were "doing quite well. . . . I'm generally pleased with what they're doing." Tr. at 220, 268-69.

9. Yankee argues that all West zone franchisees operating in compliance with the franchise guidelines were similarly and adversely affected by Dunkin's failure to maintain standards. Pet. at 13. Yankee never showed anything remotely proving this assertion. The undisputed evidence was that West zone sales *increased* steadily from 1990-1995. Def. Ex. 182.

10. Yankee asserts that its witnesses testified that low standards in the west caused it to suffer damage. Pet. at 3. The evidence was exactly the opposite. After reviewing the record, the Fifth Circuit found that "[n]o proof was presented to explain or substantiate this theory" other than a "Dunkin' franchisee

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[10] Pursuant to the franchise agreement, Dunkin' provides numerous services to franchisees, including initial training; operating procedures to assist the franchisee in developing financial records and controls, personnel policies, production methods and approved sources of supply; assistance in opening and initial operation of a shop; maintaining a continuing advisory relationship with the franchisee, including consultation in the areas of marketing, merchandising and business operations; providing and updating operating manuals; reviewing for approval all proposed advertising and promotional materials prepared by franchisees; and administering the Franchise Owners Advertising and Sales Promotion Fund and directing the development of all advertising and promotional programs.

[who] testified that a customer who had a bad experience in another Dunkin' shop in the West zone may not stop at a Dunkin' shop while driving through Beaumont. Other than this vague testimony we find no support for Yankee's theory that reduced standards in other shops in the west caused a substantial sales reduction in Yankee's shop." Pet. at 5a-6a n.3.

IV. THE QUESTIONS PRESENTED BY YANKEE MISREPRESENT THE FIFTH CIRCUIT'S RULING.

The "Questions Presented" by Yankee are improper in that they misrepresent the basis of the Fifth Circuit's ruling. First, whether a franchisor owes a duty to a franchisee to protect the reputation and goodwill of the system, i.e., the trademark, and to continue its efforts to maintain standards is controlled by the Lanham Act and the franchise agreement. Neither the district court nor the Fifth Circuit was ever asked to determine whether these duties exist. Nor is the issue of whether a franchisee can recover damages for a breach of the duty to maintain standards properly before this Court. Regardless of whether there is such a right, the Fifth Circuit found based on the record that this particular franchisee utterly failed to establish that it had suffered any damages at all.

The second question framed by Yankee is similarly flawed in that it never showed that it was a "franchisee *damaged* by franchisor's breach of contract" (emphasis added). Further, it is inaccurate to characterize the northeast, as opposed to the west, as a region that had "not been effected [sic] by franchisor's breach" because there was no evidence that *any* region had been so affected. Indeed, the Fifth Circuit found that Yankee's expert had never established any basis at all for comparing Yankee with the average shop in the northeast.

CONCLUSION

Yankee's petition for a writ of certiorari is devoid of good faith arguments based on accurate record citations aimed at relevant issues. The petition fails to raise a single issue that requires this Court's attention, and it should be denied.

Respectfully submitted,

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